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MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1050

VELMA ROSE BIGHEART, surviving spouse of William Bigheart, Jr.,
Appellant,

vs.

JOHN PAPPAN, Superintendent of the Osage Indian Agenty, John Slater, Field Solicitor of the Osage Indian Agency, Raymond L. Sanford, Regional Solicitor of the Department of the Interior, and Walter L. Hickel, Secretary of the Interior,
Appellees,

and Pearl Hall, Terrill Rae Bigheart, Bruce W. Gambill, Randy William Bigheart and Matthew Kane, Jr.,
Intervenor-Appellees.

BRIEF OF INTERVENORS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE TENTH JUDICIAL CIRCUIT

BRUCE W. GAMBILL and
ROBERT P. KELLY
KELLY & GAMBILL
Sixth at Kihekah
Pawhuska, Oklahoma

Attorneys for Intervenor-Appellees

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PROPOSITION I

"PURSUANT TO RULE 24 OF THIS COURT INTERVENORS OBJECT TO THE JURISDICTION OF THIS COURT TO GRANT CERTIORARI HEREIN."

Appellant in her petition for Writ of Certiorari has invoked on page 2 the jurisdiction of this court under Title 28 U.S.C.A. §1254 (2). The section states:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

As stated, the Appellant has invoked the jurisdiction of this court in an attempt to overturn a decision of the Court of Appeals which, according to Appellant, holds a state law to be repugnant to the laws of the United States. She specifically limited the asserted jurisdiction to cited provision. The Statute specifically provides that a review within said section *precludes* a review by writ of certiorari.

While the rules of this court do not in the realm of certiorari provide for a Motion for Dismissal wherein the Appellant has not taken appeal in conformity to Statute as in Rule 16 (la) on appeals provision for the same is inculcate in Rule 24 providing for objections to the jurisdiction of the court to grant certiorari.

PROPOSITION II

THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE IN THE COURTS BELOW ARE SO UNSUBSTANTIAL AND HAVE BEEN CONSISTENTLY RULED UPON IN FAVOR OF SUCH JUDGMENT THAT THERE IS NO NEED FOR FURTHER ARGUMENT.

The granting of a writ of certiorari is discretionary with the court. *Hyde* v. *Shine*, Cal. 1905, 25 S. Ct. 760, 199 U.S. 62, 50 L. Ed. 90.

The factual situation question herein resolves itself to, can a white woman elect to take a statutory forced share of a one-half or more blood deceased, restricted Osage Indian's restricted property?

This question has repeatedly and without exception held by the courts to be answered in the negative. The involved Act of February 27, 1925, Sec. 7 (43 Stat. 1008, 1011) as amended on September 1, 1950 (64 Stat. 572) provide in summary, that none but heirs who are a citizen of the United States and enrolled or have a lineal Indian ancestor enrolled on an Indian membership roll maintained by the Secretary of Interior, may inherit restricted Osage land, monies or interest from a decedent of one-half or more Osage Indian blood.

The proposition has been determined consistently by this court adversely to Appellant. In the case of *Blanset* v. *Cardin*, 1921, 256 U.S. 319, 41 S. Ct. 519, 65 L. Ed. 950 the exact factual problem was presented. The case arose in Oklahoma on essentially identical facts. A white man was disinherited by his Quapaw wife and sought to take restricted property utilizing the Oklahoma forced heir statute which is essentially similar as todays statute. The Quapaws, as with the Osages, had the right to make

a will for disposition of their property subject to rules of the Secretary of Interior. The court determined that the Act of Congress was prompted by prudence to "afford protection to dependent and natural heirs against the waste of the estate as the result of an unfortunate marriage and enforced inheritance by state law." The court concluded "that it was the intention of Congress that this class of Indians should have the right to dispose of property by will under this Act of Congress, free from restrictions on the part of the state as to the portions to be conveyed, or as to the objects of the testators bounty."

This court has, on similar grounds, determined that Congress can regulate as to inheritance of restricted Indian properties and that this classification, although based on race, is permissable. *Simmons* v. *Eagle Seelatsee*, 1966, 384 U.S. 209, 86 S. Ct. 1459, 16 Ed 2d 480.

The general powers to legislate such restrictions has a rich, consistent, judicial history. In the Oklahoma case of *Brader* v. *James*, 246 U.S. 8, 38 S. Ct. 285, 62 L. Ed. 591, the authority of Congress to impose restrictions on Indians who had been given citizenship and were residents of the State of Oklahoma at the time involved was determined. The Supreme Court of the United States said:

> "In view of the repeated decisions of this court we can have no doubt of the constitutionality of such legislation. While the tribal relation existed, the national guardianship continued, and included authority to make limitations upon the rights which such Indians might exercise in respect to such lands as are here involved. This authority did not terminate with the expiration of the limitation upon the rights to dispose of allotted lands; the right and duty of congress to safeguard the rights of Indians

still continued. It has been frequently held by this court that the grant of citizenship is not inconsistent with the right of Congress to continue to exercise this authority by legislation deemed adequate to that end. It is unnecessary to again review the decisions of this court which support that authority. Some of them were reviewed in the Marchie Tiger case. The doctrine is reiterated in Heckman v. United States, 224 U.S. 413, 56 L. Ed. 820, 32 Sup. Court Rep. 424, and United States v. Nice, 241 U.S. 591, 598, 60 L. Ed. 1192, 1195, 36 Sup. Ct. Rep. 496".

In dealing with Indian questions, it must be remembered that the powers of Congress are plenary. Stephens v. Cherokee Nation, 174 U.S. 445, 19 S. Ct. 772, 43 L. Ed. 1041; Cherokee Nation v. Hitchcock, 187 U.S. 294, 23 S. Ct. 216; 47 L. Ed. 299; Gritts v. Fisher, 224 U.S. 640, 32 S. Ct. 580, 56 L. Ed. 928; Cully v. Mitchell (C.C.A. 10) 37 F. (2d) 493, certiorari denied 281 U.S. 740, 50 S. Ct. 347, 74 L. Ed. 1154.****"

The Oklahoma Court in *Scioto Oil Co.* v. *O'Hern*, 670 Okl. 106, 169 P. 483, 494, stated:

"Section 1 of the Enabling Act provides: 'That nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."

And Section 21:

"***And all laws in force in the territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said state, except as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States.***"

CONCLUSION

It is respectfully submitted that the Appellant has not vested this court with jurisdiction and that such issues as have been presented have consistently been ruled by this court in support of the court below. It is respectfully submitted that the Petition be denied.

Respectfully submitted,

BRUCE W. GAMBILL and
ROBERT P. KELLY
KELLY & GAMBILL
Sixth at Kihekah
Pawhuska, Oklahoma

Attorneys for Intervenor-Appellees

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